DEPENDENT RELATIVE REVOCATION OF WILLS.

The Doctrine and Its Limits.

THE doctrine of dependent relative revocation may be broadly stated thus: When the testator's intention to revoke is essential, the revocation of a will is ineffective if the intention to revoke was conditioned upon a certain situation and this situation does not exist.[1] In other words, the revocation is not absolute but relates to a situation that induces the revocation; the revocation is not independent but dependent for its legal validity upon a condition of affairs which furnishes the reason for such revocation. Sometimes the doctrine is treated under the name of conditional revocation [2] or revocation by mistake.[3] Though both of these expressions are unobjectionable, the technical name of dependent relative revocation seems preferable. It is accordingly used by most writers on the subject.[4]

Wills may be revoked by the act of the testator (under which is included revocation by destructive act and revocation by a subsequent instrument) or by the operation of law.[5]

Revocation of Wills.

1. Act of Testator.
   a. Destructive Act.
   b. Subsequent Instrument.
2. Operation of Law.

---

[1] For discussion of this doctrine and elaborate citations of cases, see Page on Wills, §§ 275-277; Rood on Wills, § 359; 1 Redfield on Wills 305, 308; 1 Jarman on Wills, 6 ed., 120; 1 Woener on Administration, 2 ed., 90, 93, 97; 40 Cyc. 1188-1189; 6 L. R. A. (N. S.) 1107; 1 Am. & Eng. Ann. Cas. 609; 48 Am. St. Rep. 198; Cent. Dig. Wills, §§ 442, 445; Dec. Dig. (Key No.) Wills, § 189; 28 Halsbury Laws of England, 572-575.

[2] See 28 Halsbury Laws of England, 572; 20 Dec. Dig. Wills, § 189.

[3] 48 Am. St. Rep. 198; Cent. Dig. Wills, § 442.

[4] See authorities cited in note 1.

[5] Page on Wills, § 245; Rood on Wills, § 320.

The doctrine of dependent relative revocation is strictly limited to revocation by act of the testator, it has no application to revocation by operation of law.[6] It does apply, however, to both classes of revocation by the act of the testator; i. e., by destructive act or by subsequent instrument. In revocation by operation of law, the testator's intention is utterly immaterial. Under certain circumstances, the law declares the will revoked regardless of the intention of the testator, or even when he was ignorant of the fact that these circumstances affected the validity of his will. Thus, at common law, the marriage of a woman[7] or the marriage of a man and the birth of issue[8] revoked a previously executed will. The law refused to countenance the will in the light of the new status and the will *ipso facto* became void. Manifestly, in such cases, there could be no room for the doctrine of dependent relative revocation.

In revocation by act of the testator (whether by destructive act or by subsequent instrument), the intention to revoke is essential.[9] If the *animus revocandi* is absent, there can be no revocation. When, therefore, the intent to revoke is conditioned upon the truth of a statement and such statement turns out to be false, then there is no intention to revoke and therefore no revocation. It is as if the testator says, "If *A* be true, I intend to revoke; if *A* be not true, I do not intend to revoke."

In revocation by destructive act (e. g., cutting, tearing, burning) the act itself is equivocal and parol evidence is freely admissible (as it needs must be) to prove the absence or presence of the intent to revoke.[10] Such evidence is also admissible to

---

[6] Page on Wills, § 275.

[7] Hodsden *v.* Lloyd (Eng.), 2 Bro. Ch. 534; Doe *v.* Staples (Eng.), 2 T. R. 684; Lansing *v.* Haynes, 95 Mich. 16; Nutt *v.* Norton, 142 Mass. 242; Colcord *v.* Conroy, 40 Fla. 97, 23 South. 961.

[8] Overbury *v.* Overbury (Eng.), 2 Shower, 242; Kenebel *v.* Scrafter (Eng.), 2 East. 530; Gay *v.* Gay, 84 Ala. 38; Shorter *v.* Judd, 60 Kan. 73, 53 Pac. 286; Baldwin *v.* Spriggs, 65 Md. 373, 5 Atl. 295.

[9] Goods of Wheeler (Eng.), 49 L. J. P. 29, 42 L. T. 60; Forbing *v.* Weber, 99 Ind. 588; Kirkpatrick *v.* Jenkins, 96 Tenn. 85; Watt's Estate, 168 Pa. St. 422; Gordon *v.* Whitlock, 92 Va. 723, 24 S. E. 343; Succession of Shaffer, 50 La. Ann. 601, 23 South. 739.

[10] Appeal of Spencer, 77 Conn. 638, 60 Atl. 289; In re Glass Estate, 14 Colo. App. 377, 60 Pac. 186; Throckmorton *v.* Holt, 180 U. S. 552.

show that the intention to revoke was not absolute but that it was conditioned upon a certain situation.[11] In which event, by the doctrine of dependent relative revocation, the revocation is invalid unless the situation turns out to be as the testator supposed. In revocation by subsequent instrument, parol evidence is not so important, since this instrument ordinarily speaks for itself. There is at least one well-defined limitation to the use of parol evidence at all. When the revocation is absolute in form and appears in an instrument that is valid, parol evidence is inadmissible to show that such apparently absolute revocation is in fact conditional.[12] To permit parol evidence, when a testator executes (with all statutory formalities) a will expressly revoking a former will, to show that such clause was dependent upon a situation *dehors* the will, would be utterly opposed to the spirit of modern testamentary law.

The doctrine of dependent relative revocation has been further limited by this qualification: The doctrine does not apply when the testator well knew (at the time of the revocation) the truth or falsity of the facts upon which the revocation is alleged to be conditioned.[13] In such cases the revocation is effective, regardless of the truth or falsity of these facts. Thus, where a codicil revoked a devise on the ground that the land given in the devise had been sold, when the testator well knew that this land had not been sold, it was held that the devise was revoked.[14] This rests on the basis that a testator possessing testamentary capacity would scarcely be guilty of the folly of revoking a provision in a will because a fact was true, when he knew that this fact was false. Had he really intended the revocation to be conditioned on the truth of a fact which he knew to be false, the testator would never have executed the revoking provision.

---

[11] Powell *v.* Powell (Eng.), L. R. 1 P. & D. 209; Dixon *v.* Solicitor to the Treasury (Eng.), Probate (1905) 42; Emernecker's Estate, 218 Pa. 369, 67 Atl. 701.

[12] Skipwith *v.* Cabell, 19 Gratt. (Va.) 758; Podleford's Estate, 190 Pa. St. 35; Durham *v.* Averill, 45 Conn. 61, 29 Am. Rep. 642.

[13] Mendenhall's Appeal, 124 Pa. St. 387, 16 Atl. 881, 10 Am. St. Rep. 590; Hayes *v.* Hayes, 21 N. J. Eq. 265.

[14] Giddings *v.* Giddings, 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192.

The doctrine of dependent relative revocation is sometimes stated in terms that indicate the limitation of the doctrine to cases in which the condition upon which the revocation depends is the setting up or establishing another will.[15] While such cases are typical examples in which the doctrine is frequently invoked, they are not the only examples of its application. The scope of the doctrine knows no such narrow and artificial limits. Thus, where a testator revokes his will under a mistake of fact but neither makes nor tries to make a second will, the doctrine would nullify the revocation and the will would be good.[16] Yet here the question has nothing to do with the second will; it is concerned with an issue between the validity of the conditionally revoked will and intestacy.

In dependent relative revocation, the condition upon which the intention to revoke depends may involve either a question of law or a question of fact.[17] The result is the same in either case. The distinction, therefore, between mistake of law and mistake of fact (so vital in other fields of law) [18] is here of no importance. Thus, in Campbell *v.* French,[19] the testator revoked legacies erroneously believing the legatees to be dead—a pure mistake of fact. The revocation was held ineffective and the legatees took under the will. In Powell *v.* Powell,[20] the testator executed a first will, afterwards he executed a second will revoking the first. Later the testator destroyed the second will intending to revoke it, in the erroneous belief that he thereby revived the first will (which was not the legal effect of revoking the second will, which second will had revoked the first)—a pure mistake of law. Here it was held that (since the intention

---

[15] 1 Am. & Eng. Ann. Cas. 609; 28 Halsbury Laws of England, 573; Gardner on Wills, § 82; 1 Woerner on Administration, 2 ed., § 51; 40 Cyc. 1188.

[16] Campbell *v.* French (Eng.), 3 Ves. Jr. 321; Skipwith *v.* Cabell, 19 Gratt. (Va.) 758.

[17] Varnon *v.* Varnon, 67 Mo. App. 534; In re Goods of McCabe (Eng.), L. R. 3 P. & D. 94; In re Goods of Moresby (Eng.), 1 Hagg. Ecc. 378.

[18] As in determining criminal responsibility, and in recovering back money paid by mistake.

[19] 3 Ves. Jr. 321.

[20] L. R. 1 P. & D. 209.

to revoke the second will was conditioned upon this mistake of law) the second will was not revoked and should be admitted to probate.

CASES SHOWING THE APPLICATION OF THE DOCTRINE.

Among the very earliest cases in which the principle of dependent relative revocation received judicial recognition is Onions *v.* Tyrer [21] (1717). Tyrer made a first will, then he made a second will with a clause revoking all former wills. Later, he destroyed his first will intending thereby to revoke it, in the belief that the second will was valid, which it was not. Lord Cowper (in a brief and unsatisfactory opinion) declared that the first will was not revoked.

In re Goods of Moresby [22] presented an interesting situation when the ship of Lieutenant Moresby of the English navy (with all his effects including his will) was taken by pirates. Some years later, on the day before his death, Moresby (firmly believing his first will to be lost and not wishing to die intestate) sent for a notary and witnesses and made a nuncupative will. After Moresby's death the first will was found and it was admitted to probate.

A number of cases turn on the erasure or cancelling of the name of the legatee [23] or the provision for such legatee) [24] and the substitution without further formality of the name of another legatee (or another provision for the same legatee), such substituted clause being invalid because it is not executed with the required statutory formalities. In these cases, when the cancellation or erasure of the name of the first legatee or the original provision was clearly conditioned on the validity of the substitution, it has been held that the will should stand as originally written and probate should be decreed accordingly.

---

[21] 2 Vern. 742.

[22] 1 Hagg. Ecc. 378.

[23] In re Goods of McCabe (Eng.), L. R. 3 P. & D. 94; In re Knapen's Will, 75 Vt. 146, 53 Atl. 1003, 98 Am. St. Rep. 808; In re Goods of Horsford (Eng.), L. R. 3 P. & D. 211.

[24] Locke *v.* James (Eng.), 11 M. & W. 901; In re Goods of Horsford (Eng.), L. R. 3 P. & D. 211.

Testator in Varnon *v.* Varnon [25] duly executed with proper formalities a will written on seven pages of paper. Later, becoming dissatisfied with the will, testator directed his brother to tear out the fifth page of the original will and substitute another sheet for the page thus torn out. The substituted sheet was invalid. The will was admitted to probate with the original page five. In this case, the physical facts showed clearly that the testator's intent to revoke the original fifth page was conditioned upon the validity of the substituted fifth page, since the testator had no intention to leave a will consisting of pages 1, 2, 3, 4, 6 and 7 without page 5.

It is believed that a study of the cases will show that the doctrine of dependent relative revocation has met with greater favor and has been given a broader application in the courts of England than in the courts of the United States.

Inconsistent Provision in Second Will Inoperative Owing to Matters Dehors the Will.

An important question (in connection with dependent relative revocation) is presented when the testator makes a valid first will disposing of certain property and then later in a second valid will (which contains a clause expressly revoking the disposition in the first will) the property is given to another; but the dispositive part of the second will is inoperative owing to matters *dehors* the will, such as the incapacity of the legatee under the second will to take the gift. Is the express clause of revocation in the second will dependent upon the validity of the dispositive part of such will? If so, the doctrine of dependent relative revocation would apply and the legatee under the first will would take. The decided weight of authority supports the view that the express revocation clause is not dependent upon the validity of the dispositive clause and that the doctrine of dependent relative revocation does not apply.[26] When, however,

[25] 67 Mo. App. 534.

[26] Tupper *v.* Tupper (Eng.), 1 K. & J. 665; Laughton *v.* Atkins, 1 Pick. (Mass.) 535; Quinn *v.* Butler (Eng.), L. R. 6 Eq. 225; Vining *v.* Hall, 40 Miss. 83; Board of Comm'rs, etc. *v.* Scott, 88 Minn. 386, 93 N. W. 109; Dudley *v.* Yates, 124 Mich. 440, 86 N. W. 959. *Contra*, see Security Co. *v.* Snow, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107.

the second will contains *no express revocation clause* but merely makes a disposition of property inconsistent with the disposition in the first will, it is believed that if the dispositive provision of the second will fails owing to matters outside of the will, then the property would go to the legatee under the first will.[27]

Was Revocation Based on Truth of Facts or Merely on Testator's Understanding of These Facts?

A testator having executed a valid will receives advice or information that would make him adversely inclined to a provision in this will. An example of this would be when a testator is told or advised that a legatee can not take the gift under the will. The testator then revokes the provision. It afterwards turns out that the advice is unsound or that the information is untrue and the legatee is competent to take. Is this a case for the doctrine of dependent relative revocation? At first blush, perhaps, it clearly seems that it is.

Here the cases make a distinction (not always easy to draw in practice) between a revocation based on the truth of the advice or information and a revocation that is absolute though there would have been no revocation had it not been for such untrue information or such unsound advice.[28] In the former case, the doctrine of dependent relative revocation applies; in the latter case, it does not. When a testator acts upon his own understanding of the situation (whether the question be one of law or one of fact) without regard to the correctness of his understanding, then a revocation is effective even though he completely misunderstood the situation that led up to the revocation. Thus a testator is erroneously told that *A* (legatee under testator's will) is incompetent to take the legacy, whereupon testator revokes the legacy. If the revocation is based on the truth of the information, the revocation fails. But suppose the testator, unwilling to take any chance as to the validity of the

[27] See cases cited in preceding note; Page on Wills 311, note 174.

[28] Thomas *v.* Howell (Eng.), 18 Eq. Cas. 198; Atty. General *v.* Lloyd (Eng.), L. R. 3 P. & D. 84; Barclay *v.* Maskelyne (Eng.), 4 Jur. N. S. 292; Atty. General *v.* Ward (Eng.), 3 Ves. Jr. 327; Skipwith *v.* Cabell, 19 Gratt. (Va.) 758; Mordecai *v.* Boylan, 6 Jones Eq. (N. C.) 365.

legacy, decides to revoke at all hazards, even though the information may prove untrue. Then the revocation is absolute and is unaffected by the fact that the information proves to be false.

In Attorney General *v.* Ward,[29] the testator revoked a gift to legatees "as I know not whether any of them are alive and if they are well provided for." The revocation was held to be absolute. In Skipwith *v.* Cabell [30] (a leading American case) testatrix revoked bequests "because of the state of the country" as she had been informed that these bequests to Northern friends might be confiscated by the Confederate States. Said Joynes, J.:[31] "It is as if she said, 'I have been advised that these legacies will be liable to confiscation, and, to avoid all risk, I revoke them!' She chose to make the revocation because she had been so advised, but she does not put it on the soundness of the advice, and the revocation can not be set aside by showing that the advice was unsound."

Will Revoked with Unfulfilled Intention to Make Another Will.

It not infrequently happens that a testator revokes his will (usually by destructive act) intending to execute another will, but he fails to carry out this intention so that the other will is never executed. Is the revocation of the first will effective? When it is clear that the revocation of the first will is based upon the execution of the second and such revocation is intended by the testator to be effective only in case the second will is executed, here the doctrine of dependent relative revocation applies.[32] But when the testator intends to revoke the first will absolutely, when this revocation is a "finality for the time being," [33] then the revocation is none the less effective merely because the testator intended to make another will in the fu-

---

[29] L. R. 3 P. & D. 84.

[30] 19 Gratt. (Va.) 758.

[31] 19 Gratt. (Va.) 758, 785.

[32] Dixon *v.* Solicitor to the Treasury (Eng.), [1905] P. 42; McIntyre *v.* McIntyre, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71. See also, cases cited in note 34.

[33] Page on Wills, 309.

ture, even though the intended execution of the second will was the motive for the revocation of the first will.[34] In other words, if the revocation of the first will and the execution of the second are parts of a single scheme, in which the revocation of the one will and the execution of another are so integrally related that the earlier revocation is conditioned on the later execution, this is a typical case of dependent relative revocation. Where, however, the testator intends to revoke the first will at all hazards and to be intestate until such second will is executed (though he fully intends to execute another will and die testate), the revocation of the first will is effective, even though the execution of the second will might be prevented by his sudden death —a chance which he takes.

Thus, in In re Emernecker's Estate[35] (Appeal of Aaron), an elderly German woman made a valid will leaving all her estate to her granddaughter. She became dissatisfied with the form of the will, owing to the erroneous advice of friends, who (as is so often the case) were as ignorant as they were well meaning. Accordingly, she destroyed the will saying that on the first fine day she "She would go to Ladner * * * to have him draw a new will." She died suddenly without executing the second will. The revocation of the first will was sustained. "She was aware that until this new will was executed, she was without any will at all."[36] Here the testatrix was exceedingly anxious that the granddaughter should take in preference to testatrix's children and the new will was merely to make this certain. Yet the court held that she died intestate. In Dixon *v.* Solicitor to the Treasury,[37] testator, after giving instructions to his solicitor for a new will, sent for his old will and cut off the signature. He stated "that he understood that the cutting out of a signature from an old will was a necessary preliminary to making a new will."[38] He died before executing the second

---

[34] In re Emernecker's Estate, 218 Pa. 369, 67 Atl. 701; Goods of Mitchelson (Eng.), 32 L. J. P. 202; Townsend *v.* Howard, 86 Me. 285; Olmsted's Estate, 122 Cal. 224; Skipwith *v.* Cabell, 19 Gratt. (Va.) 758.

[35] 218 Pa. 369, 67 Atl. 701.

[36] 67 Atl. 702.

[37] [1905] P. 42.

[38] [1905] P. 43.

will. The judge submitted two questions to the jury: "(1) Whether the testator cut his signature off the will with the intention of revoking the will; or (2) whether the testator cut his signature off the will with the intention that the will should be revoked conditionally on his executing a fresh will." [39] The jury answered the first question in the negative and the second question in the affirmative. Whereupon, the court declared the revocation of the first will ineffective and pronounced for that will.

Distinction in Legal Effect as to Mistake in the Inducement between the Execution and the Revocation of a Will.

The doctrine of dependent relative revocation shows clearly that a mistake in the inducement may annul the revocation of a will. A mistake in the inducement (however vital) does not affect the validity of the execution of a will.[40] Thus, A believing firmly that his favorite son John is dead (induced solely by such belief) makes a will absolute in form leaving all his property to his son Ben. The will is unaffected by the mistake in the inducement and is valid, though John turns out to be alive. But suppose that A have made a will leaving all his property to John. On being erroneously informed that John is dead, A (believing John to be dead, and conditioning his revocation on John's death) destroys the will intending to revoke it. The revocation is clearly ineffective.

For this difference, many reasons might be given. Under the rule *ut res valeat,* the law favors the validity of a will executed with all the prescribed statutory formalities; by the

---

[39] [1905] P. 46.

[40] Gifford *v.* Dyer, 2 R. I. 99, 57 Am. Dec. 708; Young *v.* Mallory, 110 Ga. 10, 35 S. E. 278; Ruffino's Estate, 116 Cal. 304; Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. 600; Maynard *v.* Tyler, 168 Mass. 107; Kennel *v.* Abbott (Eng.), 4 Ves. 802. A mistake in the factum, however, does invalidate a will. Waite *v.* Frisbie, 45 Minn. 361, 47 N. W. 1069; Alter's Appeal, 67 Pa. St. 341, 5 Am. Rep. 433; Baker *v.* Baker, 102 Wis. 226, 78 N. W. 453; Budlong's Will, 126 N. Y. 243; Goods of Hunt (Eng.), L. R. 3 P. & D. 250.

same token, revocations are disfavored. The field of parol evidence is much broader as to the revocation of wills. As few (if any) wills are made with a perfect understanding of the many complex factors that induce a testator to make the specific will in question, a deplorable element of uncertainty would be introduced into all wills, if the validity of a will could be attacked on the score of a mistake that induced the testator to make the particular will that he did make and which he fully intended to make.

Armistead M. Dobie.

UNIVERSITY OF VIRGINIA, 1915.